SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 656

WILBUR F. BOOTH

vs.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1933

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. 42540

WILBUR F. BOOTH

vs.

THE UNITED STATES

Statement of Facts and Certificate

Mr. John S. Flannery appeared for the plaintiff.

Messrs. Frank J. Wideman and Alexander Holtzoff appeared for the defendant.

Before Chief Justice Booth, Judge Green, Judge Littleton, Judge Williams, and Judge Whaley.

STATEMENT OF FACTS

The Court of Claims hereby certifies that the record of the above-entitled case now pending before it discloses the following:

Plaintiff, Wilbur F. Booth, duly filed his petition in the Court of Claims on the 7th day of November, 1933, in which he asked judgment against the United States in the sum of $697.93 as salary due him for the months of June to October, 1933, inclusive, all of which will more particularly appear from his said petition, a copy of which accompanies this certificate and is marked "Exhibit A".

The petition of plaintiff, among other things, alleges in substance:

That on March 18, 1925, the President of the United States, by and with the advice and consent of the Senate, duly appointed plaintiff United States Circuit Judge for the Eighth Judicial Circuit, and thereafter, on March 27, 1925, plaintiff duly qualified, and ever since has been engaged in the performance of his duties as such United States Circuit Judge.

[fol. 2] Plaintiff attained the age of seventy years on August 22, 1931.

That for many years prior to and up to the time of his appointment and qualification as United States Circuit

Judge, the plaintiff had held the office of Judge of the United States District Court for the District of Minnesota, and by November 28, 1931, the plaintiff had served continuously as a District or Circuit Judge for more than seventeen years.

That on January 1, 1932, the plaintiff retired as a United States Circuit Judge, pursuant to the provisions of section 260 of the Judicial Code, as amended by the Act of February 25, 1919, which permits judges, instead of resigning, to retire upon the salary of which they are then in receipt, from regular active service. That ever since his retirement the plaintiff has continued to perform the duties of retired United States Circuit Judge, in the manner provided by law, and has sat as a member of the United States Circuit Court of Appeals for the Eighth Judicial Circuit at a number of the terms thereof, and has participated in the hearing and decision of many causes pending in that court.

Plaintiff further avers that at the date of his appointment the salary fixed by law for a United States Circuit Judge was $8,500 per annum. That the salary of United States Circuit Judges was increased to $12,500 per annum by the Act of December 13, 1926 (chap. 6, sec. 1; 44 Stat. 919) payable in equal monthly installments, and that at the date of plaintiff's retirement his salary fixed by law was $12,500 per annum.

Section 13 of the Independent Offices Appropriation Act, approved June 16, 1933 (Public Act No. 78), is as follows:

"For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum."

Pursuant to the provisions of said Act, and for the period from June 15, 1933, to and including October 31, 1933, the plaintiff has been paid by the United States as his compensation as United States Circuit Judge, retired, at a rate fifteen per cent below that fixed by law at the date of his retirement, and by reason thereof there has been withheld from him for the period mentioned the sum of $697.93. That he has protested against the enforced

reduction attempted by the Act of June 16, 1933, deeming it his duty to maintain the independence of the judiciary and resist unconstitutional diminution of the compensation of Federal judges, but the officials of the Department of Justice, whose disbursing officers pay compensation of judges, have advised the plaintiff that the said Act of June 16, 1933, is binding upon the Department and must be complied with by its disbursing clerk in paying the salaries of retired judges, unless and until it is declared invalid by a court of competent jurisdiction.

Plaintiff further avers in his petition that the Act of June 16, 1933, is unconstitutional, null and void, and violates section 1 of article III of the Constitution of the United States, which provides that the judges shall at stated times receive for their services compensation which shall not be diminished during their continuance in office.

Plaintiff is the owner of the claim, of which there has been no assignment or transfer and has at all times borne true allegiance to the Government of the United States and has never in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and is a citizen of the United States.

[fol. 4] To this petition the defendant has filed a demurrer, on the ground that the petition does not state a cause of action against the defendant.

The defendant, by the filing of this demurrer, admits the facts stated in the petition to be true, and upon the record before it the Court finds it necessary for a proper disposition of the case that certain constitutional questions should be determined. These constitutional questions are as follows:

QUESTIONS CERTIFIED

1. Does a United States District or Circuit Judge who, having served continuously for ten years and attained the age of seventy years, does not resign but retires under the provisions of section 260 of the Judicial Code, as amended, continue in office within the meaning of section 1 of article III of the Constitution which forbids diminution of the compensation of Judges during their continuance in office?

2. Where the salary of a United States District or Circuit Judge is increased by law after his appointment and

he has subsequently retired in full compliance with the provisions of section 260 of the Judicial Code, as amended; is a reduction of his compensation as a retired Judge to an amount not below that fixed by law as his salary at the time of his appointment a diminution of his compensation within the meaning of section 1 of article III of the Constitution?

It is respectfully requested that the Supreme Court of the United States give appropriate instructions on the [fol. 5] above questions and certify and transmit and refer the same to the Court of Claims of the United States for its guidance in the further progress of the case.

Fenton W. Booth, Chief Justice. Wm. R. Green, Judge. Benjamin H. Littleton, Judge. T. S. Williams, Judge. Richard S. Whaley, Judge.

[fol. 6] EXHIBIT "A"

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 42540

WILBUR F. BOOTH

vs.

THE UNITED STATES

PETITION—Filed November 7, 1933

Plaintiff, Wilbur F. Booth, respectfully states:

1. He is a citizen of the United States and a resident of the City of Minneapolis, in the State of Minnesota.

2. On March 18, 1925, the President of the United States, by and with the advice and consent of the Senate of the United States, duly appointed the plaintiff United States Circuit Judge for the Eighth Judicial Circuit, and thereafter, on March 27th, 1925, the plaintiff duly qualified as such Circuit Judge, and ever since said date, has been engaged in the performance of the duties of that office.

3. For many years prior to and up to the time of his appointment as United States Circuit Judge, the plaintiff

had held the office of Judge of the United States District Court for the District of Minnesota. He attained the age [fol. 7] of seventy years on August 22, 1931, and by November 28, 1931, the plaintiff had served continuously as a Federal judge for more than seventeen years.

4. On or about November 28, 1931, the plaintiff signed and caused to be delivered to the President of the United States a written request for retirement, in which the plaintiff stated:

"If it is not incompatible with the good of the service, and subject to your approval, it is my wish to retire, effective on as early a date as you may find feasible to fix, as United States Circuit Judge of the Eighth Circuit, under that provision of the United States Statutes (Title 28, Section 375, U. S. Code) which reads as follows:

"'But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake, or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake.'"

In said document the plaintiff further stated:

"I believe this step is in accord with the purpose of the Statute, and I think that it will strengthen the Court by securing the services of a younger man, while not entirely dispensing with mine."

[fol. 8] Under date of December 4, 1931, the President of the United States addressed to the plaintiff, and the plaintiff received, a letter as follows:

"DEAR JUDGE BOOTH: I have your letter of November 28, 1931, in which you express your desire to retire as United States Circuit Judge for the Eighth Circuit under the provisions of the United States Statutes (Title 28, Section 375, United States Code).

Your retirement is approved, effective January 1, 1932.

I take the occasion to assure you of my best wishes for your future health and happiness, and to thank you for the valued service you have rendered.

Yours faithfully, Herbert Hoover."

5. On January 1, 1932, the retirement of the plaintiff as a United States Circuit Judge became effective pursuant to his request as aforesaid. Ever since January 1, 1932, plaintiff has continued to perform the duties of a retired United States Circuit Judge in the manner provided by law, and has sat as a member of the United States Circuit Court of Appeals for the Eighth Judicial Circuit at a number of terms thereof, and has participated in the hearing and decision of many causes pending in that court, and has performed many judicial acts, and frequently has made judicial orders in causes pending in said court or in the United States District Court for the District of Minnesota.

6. At the date of the appointment of the plaintiff as a United States Circuit Judge the salary of Circuit Judges was fixed by law at $8500 per annum, and at the date of his retirement the salary fixed by the Act of December 13, 1926, c. sec. 1, 44 Stat. 919 (U. S. Code, title 28, sec. 213) for United States Circuit Judges was the sum of $12,500 per annum, payable in equal monthly installments. Sec- [fol. 9] tion 13 of the Independent Offices Appropriation Act, approved June 16, 1933 (Public Act No. 78), contains the following provision:

"For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum."

Pursuant to the provisions of said Act, and for the period from June 1, 1933, to and including October 31, 1933, plaintiff has been paid by the United States on account of his

salary as United States Circuit Judge, retired, the sum of $4510.40, and no more, and by reason thereof there has been wrongfully withheld from the plaintiff for the period mentioned the sum of $697.93.

7. Although the plaintiff, pursuant to section 7, title II of the Act of Congress, approved March 20, 1933, which gives authority to the Treasurer of the United States to receive back 15 per cent of the salaries of judicial officers, voluntarily returned to the United States 15 per cent of his salary for the months of April and May, 1933, he has protested against the enforced reduction attempted by the said Act of June 16, 1933, deeming it his duty to maintain the independence of the judiciary and resist unconstitutional dimimution of the compensation of Federal judges. On the tender to him of reduced compensation for the month of June, 1933, this plaintiff asked of the Attorney General of the United States the legal basis for the reduction by the disbursing officers of the Department of Justice, by whom judicial salaries are paid, and was advised by the Assistant to the Attorney General as follows:

"The Department has not considered the validity of this section [referring to section 13, Public Act No. 78, approved [fol. 10] June 16, 1933]. It is, of course, binding upon the Department and must be complied with by the disbursing clerk in paying the salaries of retired judges, unless and until it is declared invalid by a court of competent jurisdiction."

The reduced compensation paid plaintiff, as aforesaid, has been received by him under protest, and only as payment on account of the salary to which he is entitled by law.

8. Section 1 of Article III of the Constitution of the United States provides:

"The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office."

Notwithstanding his retirement the plaintiff has continued to hold the office of United States Circuit Judge, and the said Act of June 16, 1933, attempting to diminish his compensation during his continuance in office is unconstitutional, null and void.

9. Plaintiff is informed that action similar to that taken in the plaintiff's case has been taken by the disbursing officers of the Department of Justice in the cases of all retired Circuit and District Judges of the United States, and while reluctant to institute a suit which may result in personal benefit to himself, plaintiff deems it his duty to maintain the constitutional independence of the judiciary, and to have the question as to the validity of said Act of June 16, 1933, judicially settled.

10. Plaintiff further states that he is the legal owner of the claim for said compensation, and there has been no [fol. 11] assignment of the whole or any part thereof, and that as far as he knows no action has been had thereon either in the congress or in any of the departments of the Government, except as stated in this petition; that he is justly entitled to the amount claimed, including all just credits and offsets; that he has at all times borne true faith and allegiance to the Government of the United States, and has not at any time voluntarily aided, abetted or given encouragement to rebellion against it.

Wherefore, the plaintiff prays judgment that he have and recover from the United States the sum of $697.93, and that he have such other relief as the nature of his case may require.

William F. Booth, Plaintiff. William D. Mitchell, John S. Flannery, Hibbs Bldg., Washington, D. C., Attorneys for Plaintiff.

STATE OF MINNESOTA,
County of Hennepin, ss:

I, Wilbur F. Booth, under oath, depose and say, that I have read the foregoing petition by me subscribed, and know the contents thereof; that the matters and things therein stated are positively true, and those stated on information and belief I believe to be true.

Wilbur F. Booth.

Subscribed and sworn to before me this 3rd day of November, 1933.

Thomas H. Howard, Notary Public, Ramsey County.
My commission expires June 12, 1936. (Seal.)

[fol. 12] CLERK'S CERTIFICATE

I, Willard L. Hart, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing certificate in the case of Wilbur F. Booth v. The United States, No. 42540, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 13th day of December, A. D., 1933.

Willard L. Hart, Chief Clerk, Court of Claims of the United States. (Seal Court of Claims.)

Endorsed on cover: File No. 38,259. Court of Claims. Term No. 656. Wilbur F. Booth vs. The United States. Certificate. Filed December 14, 1933. File No. 656, O. T., 1933.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 657

CHARLES F. AMIDON

vs.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1933

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. 42541

CHARLES F. AMIDON

vs.

THE UNITED STATES

Statement of Facts and Certificate

Mr. John S. Flannery appeared for the plaintiff.

Messrs. Frank J. Wideman and Alexander Holtzoff appeared for the defendant.

Before Chief Justice Booth, Judge Green, Judge Littleton, Judge Williams, and Judge Whaley.

STATEMENT OF FACTS

The Court of Claims hereby certifies that the record of the above-entitled case now pending before it discloses the following:

Plaintiff, Charles F. Amidon, duly filed his petition in the Court of Claims on the 7th day of November 1933, in which he asks judgment against the United States in the sum of $558.34 as salary due him for the months of June to October, 1933, inclusive, all of which will more particularly appear from his petition, a copy of which accompanies this certificate and is marked "Exhibit A."

The petition of plaintiff, among other things, alleges:

That on February 18, 1897, he was appointed by the President of the United States to be Judge of the United States District Court for the District of North Dakota, by and with the advice and consent of the Senate, and on [fol. 2] February 27, 1897, duly qualified, and ever since that date has been engaged in the performance of his duties as Judge of the United States District Court for the District of North Dakota.

That he attained the age of seventy years on August 17, 1926, and on June 2, 1928, retired, pursuant to the provisions of section 260 of the Judicial Code, as amended by the Act of February 25, 1919, which permits a judge, instead of resigning, to retire from regular active service.

Ever since his retirement as aforesaid the plaintiff has continued to perform the duties of a retired United States District Judge, in the manner provided by law, and has, as conditions have permitted and the business of the court demanded, performed judicial acts in that capacity.

At the date of the appointment of the plaintiff, the salary of a United States District Judge was fixed by law at the sum of $5,000 per annum, payable in monthly installments, and the rate of compensation of District Judges has been increased from time to time by act of congress, until at the date of plaintiff's retirement the salary of a United States District Judge was fixed by the Act of December 13, 1926, (chap. 6, sec. 1; 44 Stat. 919) at the rate of $10,000 per annum, at which rate it has since remained, except as hereinafter set forth.

That section 13 of the Independent Offices Appropriation Act, approved June 16, 1933, (Public Act No. 78) is as follows:

"For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum."

[fol. 3] That pursuant to the provisions of said act, for the period from June 15, 1933, to October 31, 1933, inclusive, the plaintiff has been paid by the defendant as salary as United States District Judge, retired, at a rate fifteen per cent. below that fixed by law at the date of his retirement, and there has been withheld from the plaintiff for the period mentioned out of his salary at the rate fixed by law at the date of his retirement the sum of $558.34. Plaintiff avers, deeming it his duty to maintain the independence of the judiciary and resist unconstitutional diminution of the compensation of Federal judges, he has protested to the Attorney General against said reduction by the disbursing officers of the Department of Justice, by whom judicial salaries are paid, and has been advised that the said Act of June 16, 1933, is binding upon the Department and must be complied with by its disbursing clerk, unless and until it is declared invalid by a court of competent jurisdiction. Plaintiff avers in his petition that the Act of June 16, 1933,

providing for reducing his compensation by fifteen per centum, is unconstitutional, null and void under the provisions of section 1 of article III of the Constitution of the United States, which provides that, "The Judges, both of the supreme and inferior Courts, shall, hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office."

Plaintiff is the owner of the claim of which there has been no assignment or transfer and has at all times borne true allegiance to the Government of the United States and has never in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and is a citizen of the United States.

[fol. 4] To this petition the defendant has filed a demurrer, on the ground that the petition does not state a cause of action against the defendant.

The defendant, by the filing of this demurrer, admits the facts stated in the petition to be true, and upon the record before it the Court finds it necessary for a proper disposition of the case that certain constitutional questions should be determined. These constitutional questions are as follows:

QUESTIONS CERTIFIED

1. Does a United States District or Circuit Judge who, having served continuously for ten years and attained the age of seventy years, does not resign but retires under the provisions of section 260 of the Judicial Code, as amended, continue in office within the meaning of section 1 of article III of the Constitution which forbids diminution of the compensation of Judges during their continuance in office?

2. Where the salary of a United States District or Circuit Judge is increased by law after his appointment and he has subsequently retired in full compliance with the provisions of section 260 of the Judicial Code, as amended, is a reduction of his compensation as a retired Judge to an amount not below that fixed by law as his salary at the time of his appointment a diminution of his compensation within the meaning of section 1 of article III of the Constitution?

It is respectfully requested that the Supreme Court of the United States give appropriate instructions on the [fol. 5] above questions and certify and transmit and refer the same to the Court of Claims of the United States for its guidance in the further progress of the case.

Fenton W. Booth, Chief Justice. Wm. R. Green, Judge. Benjamin H. Littleton, Judge. T. S. Williams, Judge. Richard S. Whaley, Judge.

[fol. 6] EXHIBIT "A"

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 42541

CHARLES F. AMIDON

vs.

THE UNITED STATES

PETITION—Filed November 7, 1933

Plaintiff, Charles F. Amidon, respectfully states:

1. He is a citizen of the United States and a resident of Fargo, in the State of North Dakota.

2. Plaintiff was given by the President of the United States an ad interim appointment as Judge of the United States District Court for the District of North Dakota, on August 31, 1896, and thereafter was nominated, and by and with the advice and consent of the Senate of the United States, was appointed by the President of the United States on February 18, 1897, as Judge of the United States Dis-[fol. 7] trict Court for the District of North Dakota, and thereafter, on February 27, 1897, duly qualified, and ever since said date has been engaged in the performance of his duties as Judge of the United States District Court for the District of North Dakota.

3. Plaintiff attained the age of seventy years prior to June 1, 1928, and on or about June 2, 1928, signed and cause- to be delivered to the President of the United States

a written request for retirement, in which the plaintiff stated:

"I became seventy years of age on the 17th of August, 1926. I was appointed United States District Judge for the District of North Dakota by President Cleveland in 1896. Hence I am entitled to retire. I therefore hereby retire (not resign) under Section 260, as amended by Chapter 29 of the Laws of 1917-1919, (40 Stat. at Large, 1156)."

Under date of June 9, 1928, the President of the United States addressed to the plaintiff, and the plaintiff received a letter as follows:

"My Dear Judge Amidon: Permit me to acknowledge receipt of your letter of June 2nd, advising that it is your wish to retire from active service on the bench. In accordance with your request, and agreeably with the provisions of Section 375, Title 28, of the code of the laws of the United States (Judicial Code, Section 260, amended), I hereby approve your retirement, effective June 2, 1928.

I avail myself of the opportunity to congratulate you upon the faithful services which you have rendered the Government, and to wish for you a long future of health and happiness.

Very truly yours, Calvin Coolidge."

[fol. 8] 4. On June 2, 1928, the retirement of plaintiff as a United States District Judge became effective pursuant to his request as aforesaid. Since June 2, 1928, the plaintiff has continued to perform the duties of a retired United States District Judge in the manner provided by law, and has performed many judicial acts in his capacity as a retired judge of the United States District Court for the District of North Dakota.

5. At the date of the appointment of the plaintiff as a United States District Judge, the salary of United States District Judges was fixed by law at the sum of $5,000 per annum, payable in monthly installments, and said salaries were increased from time to time by Act of Congress, until at the date of plaintiff's retirement aforesaid the salary of a United States District Judge fixed by the Act of December 13, 1926, c. 6, Sec. 1; 44 Stat. 919 (U. S. Code, Title 28, Sec. 5) was at the rate of $10,000 per annum. Section 13

of the Independent Offices Appropriation Act, approved June 16, 1933 (Public Act No. 78), contains the following provision:

"For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum."

Pursuant to the provisions of said Act, and for the period from June 1, 1933, to and including October 31, 1933, the plaintiff has been paid by the defendant on account of his salary as United States District Judge, retired, the sum of $3,608.32, and no more, and by reason thereof there has been wrongfully withheld from the plaintiff for the period mentioned, the sum of $558.34.

[fol. 9] 6. Plaintiff has protested against the enforced reduction attempted as aforesaid, deeming it his duty to maintain the independence of the judiciary and resist unconstitutional diminuation of the compensation of Federal judges. On the tender to him of reduced compensation for the month of June, 1933, this plaintiff protested to the Attorney General of the United States against said reduction by the disbursing officers of the Department of Justice, by whom judicial salaries are paid, and thereupon received from the Department of Justice the following letter:

"July 15, 1933.

Hon. Charles F. Amidon, United States District Judge, Retired, Box 602, Westport, Connecticut.

My Dear Judge Amidon: The Department has received your letter of July 12th in reference to the reduction in your salary as provided by Section 13 of the Act of June 16, 1933. I appreciate the force of your suggestions, but there does not seem to be anything the Department can do about it. The disbursing clerk is required to comply with the law, unless and until it is declared invalid by a court of competent jurisdiction.

Sincerely yours, C. E. Stewart, Administrative Assistant."

The reduced compensation paid plaintiff as aforesaid has been received by him under protest and only as payment on account of the salary to which he is entitled by law.

7. Section 1 of Article III of the Constitution of the United States provides:

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the [fol. 10] Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Notwithstanding his retirement, the plaintiff has continued to hold the office of United States District Judge, and the said Act of June 16, 1933, attempting to diminish his compensation during his continuance in office is a violation of said Section 1 of Article III of the Constitution, and is unconstitutional, null and void.

8. Plaintiff is informed that action similar to that taken in the plaintiff's case has been taken by the disbursing officers of the Department of Justice, in the cases of all retired Circuit and District Judges of the United States, and while reluctant to institute suit which may result in personal benefit to himself, he deems it his duty to maintain the constitutional independence of the judiciary, and to have the question as to the validity of said Act of June 16, 1933, judicially settled, and to remove the cloud created by said Act upon the judicial powers of retired judges.

9. Plaintiff further states that he is the legal owner of the claim for said compensation, and there has been no assignment of the whole or any part thereof, and that as far as he knows no action has been had thereon either in the Congress or in any of the Departments of the Government, except as stated in this petition; that he is justly entitled to the amount claimed, including all just credits and offsets; that he has at all times borne true faith and allegiance to the Government of the United States, and has not at any time voluntarily aided, abetted or given encouragement to rebellion against it.

[fol. 11] Wherefore the plaintiff prays judgment that he have and recover from the United States the sum of $558.34, and that he have such other relief as the nature of his case may require.

Charles F. Amidon, Plaintiff.

William D. Mitchell, John S. Flannery, Hibbs Bldg., Washington, D. C., Attorneys for Plaintiff.

STATE OF CONNECTICUT,
County of Fairfield, ss:

I, Charles F. Amidon, under oath, depose and say, that I have read the foregoing petition by me subscribed, and know the contents thereof; that the matters and things therein stated are positively true, and those stated on information and belief I believe to be true.

Charles F. Amidon.

Subscribed and sworn to before me this 3d day of November, 1933.

Charles C. Lunny, Notary Public, Fairfield County.
My Commission expires Feb. 1, 1934. (Seal.)

[fol. 12] CLERK'S CERTIFICATE

I, Willard L. Hart, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing certificate in the case of Charles F. Amidon v. The United States, No. 42541, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 13th day of December, A. D., 1933.

Willard L. Hart, Chief Clerk, Court of Claims of the United States. (Seal Court of Claims.)

Endorsed on cover: File No. 38,260. Court of Claims. Term No. 657. Charles F. Amidon vs. The United States. Certificate. Filed December 14, 1933. File No. 657, O. T., 1933.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 656

WILBUR F. BOOTH

vs.

THE UNITED STATES.

No. 657

CHARLES F. AMIDON

vs.

THE UNITED STATES.

ON CERTIFICATES FROM THE COURT OF CLAIMS

BRIEF FOR THE PLAINTIFFS

OPINIONS BELOW

The Court of Claims has not rendered an opinion.

JURISDICTION

The cases reached this Court on certificates from the Court of Claims, pursuant to Section 3(a) of the Act of February 13, 1925 (Chap. 229, 43 Stat. 936; U. S. C., Title 28, Sec. 288).

THE QUESTIONS CERTIFIED

1. Does a United States District or Circuit Judge who, having served continuously for ten years and

attained the age of seventy years, does not resign but retires under the provisions of Section 260 of the Judicial Code, as amended, continue in office within the meaning of Section 1 of Article III of the Constitution, which forbids diminution of the compensation of judges during their continuance in office?

2. Where the salary of a United States District or Circuit Judge is increased by law after his appointment, and he has subsequently retired in full compliance with the provisions of Section 260 of the Judicial Code, as amended, is a reduction of his compensation as a retired judge to an amount not below that fixed by law as his salary at the time of his appointment a diminution of his compensation within the meaning of Section 1 of Article III of the Constitution?

STATUTES INVOLVED

The provision for retirement in Section 260 of the Judicial Code, as amended by the Act of February 25, 1919 (Chapter 29, Section 6, 40 Stat. 1157; U. S. C., Title 28, Sec. 375), and by the Act of March 1, 1929 (Chapter 419, 45 Stat. 422), is as follows:

> "When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years, continuously *or otherwise,* and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may

retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake.

In the event any circuit judge, or district judge, having so held a commission or commissions at least ten years, continuously *or otherwise,* and having attained the age of seventy years as aforesaid, shall nevertheless remain in office, and not resign or retire as aforesaid, the President, if he finds any such judge is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character, may, when necessary for the efficient dispatch of business, appoint, by and with the advice and consent of the Senate, an additional circuit judge of the circuit or district judge of the district to which such disabled judge belongs. And the judge so retiring voluntarily, or whose mental or physical condition caused the President to appoint an additional judge, shall be held and treated as if junior in commission to the remaining judges of said court, who shall, in the order of the seniority of their respective commissions, exercise such

powers and perform such duties as by law may be incident to seniority. In districts where there may be more than one district judge, if the judges or a majority of them can not agree upon the appointment of officials of the court, to be appointed by such judges, then the senior judge shall have the power to make such appointments.

Upon the death, resignation, or retirement of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as provided in this section, the vacancy caused by such death, resignation, or retirement of the said judge so entitled to resign shall not be filled."

Our italics show the only changes made by the Act of March 1, 1929.

The Act to reduce pay of retired judges is Section 13 of the Independent Offices Appropriation Act, approved June 16, 1933 (Public No. 78), and is as follows:

"For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum."

The pertinent provision of Section 1 of Article III of the Constitution is:

"The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, re-

ceive for their Services, a Compensation, which shall not be diminished during their continuance in Office."

STATEMENT

No. 656. Wilbur F. Booth, formerly District Judge, was appointed United States Circuit Judge March 18, 1925, and qualified March 27, 1925 (R. 1). He attained the age of seventy years on August 22, 1931, and by November 28, 1931, had served continuously as District or Circuit Judge for more than seventeen years (R. 2). On November 28, 1931, he addressed a letter to the President asking to retire (not resign) under those provisions of Section 260 of the Judicial Code allowing judges to retire instead of resigning (R. 5). His retirement became effective January 1, 1932 (R. 2, 6). Since retirement he has performed his judicial functions as provided by law (R. 2, 6). At the time of his appointment as Circuit Judge the annual compensation of Circuit Judges was fixed by law at $8,500 (Act of Feb. 25, 1919, Chap. 29, Sec. 2, 40 Stat. 1156). It was increased to $12,500 by the Act of December 13, 1926 (Chap. 6, Sec. 1, 44 Stat. 919), and stood at that figure when he retired. The 15% reduction, attempted by the Act of June 16, 1933, for retired judges, would reduce his compensation to $10,625 per annum. The amount withheld from him under the Act of June 16, 1933, for the period from its passage to November 1, 1933, has been the sum of $697.93. He has protested to the Attorney General against the reduction (R. 2), and has been advised that, "the Department has not considered the validity of this Section [referring to Section 13 of the Act of June 16, 1933]. It is, of course, binding upon the Department and must be complied with by the dis-

bursing clerk in paying the salaries of retired judges, unless and until it is declared invalid by a court of competent jurisdiction" (R. 7).

No. 657. Charles F. Amidon was appointed Judge of the United States District Court for the District of North Dakota on February 18, 1897, by and with the advice and consent of the Senate, and took the oath of office February 27, 1897. Serving continuously in that office, he attained the age of seventy years on August 17, 1926, and on June 2, 1928, he retired, pursuant to Section 260 of the Judicial Code, as amended by the Act of February 25, 1919 (R. 1).

His letter to the President states clearly his intention to retire and not resign (R. 5). Since retirement he has been performing judicial functions as his health has permitted and as the business of the court has required, as provided by law for retired judges (R. 2).

At the date of his appointment the annual compensation of district judges was fixed by law at $5,000 (Act of February 24, 1891, ch. 287, 26 Stat. 783). It was increased to $6,000 by the Act of February 12, 1903 (ch. 547, 32 Stat. 825); to $7,500 by the Act of February 25, 1919 (ch. 29, Sec. 1, 40 Stat. 1156); and to $10,000 by the Act of December 13, 1926 (ch. 6, Sec. 1, 44 Stat. 919) and stood at that figure at the time of his retirement and at the date of the passage of the Act of June 16, 1933 (R. 2). On the latter date Congress passed the Act above quoted attempting to reduce the salaries of retired judges 15%, thus reducing Judge Amidon's compensation to $8,500 per annum. For the period from June 16 to November 1, 1933, his compensation has been paid at the reduced rate, the amount of the reduction for that period being $538.34 (R. 2). He has duly protested against the reduction, and received the payments on account (R. 2). In answer to his protest to the Disbursing Officer

of the Department of Justice, he was advised that, "the disbursing clerk is required to comply with the law, unless and until it is declared invalid by a court of competent jurisdiction" (R. 6).

These suits were thereupon begun in the Court of Claims; the United States demurred to the complaints, thus raising the constitutional questions which have been certified to this Court, and with the cooperation of the Solicitor General the cases have been advanced to be heard together as one case.

SUMMARY OF ARGUMENT

I. The Act of June 16, 1933, attempting to reduce the compensation of retired judges not only is an unconstitutional interference with the independence of the judiciary, but casts a cloud upon the judicial powers of retired judges. It is in the public interest that these questions be promptly settled, and it is the duty of retired judges to take steps to that end.

II. The Constitution forbids diminution of the compensation of judges during their continuance in office. Judges who retire, instead of resigning, continue in office. Section 260 of the Judicial Code makes a clear distinction between resignation and retirement. It provides that retired judges may continue to perform judicial functions. It only relieved them of *regular* active service. They are not disqualified to perform any of the functions of judges in regular active service. In order to perform judicial functions they must continue in office. To construe this statute as effecting removal from office of a retired judge would be to make unconstitutional its provisions that retired judges may continue to perform judicial functions. If retired judges do not continue in office, they

may not perform judicial functions; if they do continue in office, they are protected by the Constitution against diminution of their compensation.

III. Diminution of compensation after an increase is prohibited by the Constitution. It is within the words of the Constitution. The Constitution does not say merely that the compensation may not be reduced below the level fixed at the time of appointment.

A diminution after an increase is likewise contrary to the purpose of the Constitution, which is to protect the independence of the judiciary, and to induce good men to remain on the bench. If, after increases in compensation are made because of changes in living conditions or other valid reasons, the judges are subject to having their compensation reduced to the original level, the legislative branch would hold over them the power to force their resignations for economic reasons, and to interfere with their independence as directly, although possibly in a less degree, than if power existed to reduce the compensation below the amount fixed at the date of appointment.

Although the point has not been discussed in cases in the Federal courts, it has been present in some, and all their reasoning leads to this conclusion. The question has been raised, and decided in accordance with our contention, in the highest courts of North Carolina, Louisiana and Pennsylvania.

ARGUMENT

I.

It is the duty of retired judges to defend the independence of the judiciary by questioning the reduction in compensation.

Reluctant as judges may be to institute litigation of this kind affecting their personal interests, it is their bounden duty to do so. In no other way can the constitutional questions be settled. It is the duty of the judges, as well as of members of the Bar, to defend the independence of the judiciary guaranteed by Section 1 of Article III of the Constitution. The Act of June 16, 1933, not only attempts an interference with judicial independence through diminution of compensation of judges performing judicial functions, but it casts a cloud upon the judicial powers of retired judges, because if they do not continue in office their judicial acts are mere usurpations. Judge Booth and Judge Amidon represent the retired circuit and district judges, and have been chosen to raise these questions because of their long and able service, high distinction, and known freedom from mercenary motives.

In *O'Donoghue* v. *The United States*, 53 Sup. Ct. Rep. 740, this Court said:

> "It is not extravagant to say that there rests upon every judge affected nothing less than duty to withstand any attempt, directly or indirectly, in contravention of the Constitution to diminish his compensation, not for his private advantage—which, if that were all, he might willingly forego—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an inde-

pendent judicial administration for the benefit of the whole people."

It is in that spirit these cases are presented.

II.

Retired Judges Continue in Office.

This is a self-evident proposition. If retired judges continue in office so as to retain constitutional power to function as judges, then obviously their compensation is protected by the Constitution, which forbids diminution of judges' compensation during their continuance in office.

The right of Federal judges to resign with pay is old, having been established in 1869 (Act of April 10, 1869, ch. 22, Sec. 5, 16 Stat. 44). The right of retirement is recent, having been established by the Act of February 25, 1919. The latter Act brings forward the old statute, and both are now included in Section 260 of the Judicial Code, above quoted. The only amendment since 1919 was by the Act of March 1, 1929, which eliminated the requirement of continuous service. After providing for resignation, the Section proceeds, "But, instead of resigning, any judge * * * qualified to resign * * * may retire." Thus, the two courses open to a judge are set in contrast.

To resign an office is to give it up (*Corpus Juris,* 54 p. 717). To retire from active service is something less (*Corpus Juris,* 54 p. 739). To retire from *regular* active service is still further removed from resignation. By retiring, a Federal judge does not retire from office or wholly from active service, but in the words of the statute, only "from *regular* active serv-

ice''. The service he does perform is active, though it may not be regular. He is not disqualified to perform the same service as before retirement. Of military officers, not wholly retired from the service, but retired from active duty, this Court said:

> "There is therefore a manifest difference in the two kinds of retirement, namely retiring from active service and retiring wholly and altogether from the service. * * * while not required to perform full service they are a part of the army." (*United States* v. *Tyler,* 105 U. S. 244. See, *Kahn* v. *Anderson,* 255 U. S. 1, 6.)

The provision for retirement authorizes retired judges to continue to perform judicial functions. If a retired judge ceases to hold office, he may not constitutionally serve as a judge. A judge, once out of office, may not be restored to office by an order of a senior circuit judge, or of the Chief Justice, calling upon him for service. That may only be done under the Constitution by appointment by the President. The provision for continued exercise, by retired judges, of the judicial power defined in the Constitution, would be void if by retirement they vacated their offices. This statute has now been in effect fourteen years, and during that time retired Federal judges have performed a vast amount of judicial labor. It is too late to say that by retirement they cease to hold office and that this judicial service has been without authority of law.

The Act of February 25, 1919, providing for retirement, was intended to allow retired judges to continue in office. It merely grants them a surcease of that amount of judicial labor too exacting for men of their

age and long service. It reduces their labors but not their powers. When they sit as judges, they are clothed with all the powers of judicial office. It provides two judges for the work previously done by one. The statute prescribes the rule of seniority between active and retired judges, and thus treats both as judges, holding the same office. Retirement makes little legal difference between the functions of active and retired judges. The provision for designating retired judges for certain service finds a counterpart in the law relating to active judges (Sec. 13 of the Judicial Code, 36 Stat. 1089). Even an active judge is under no more than a moral obligation to perform all of the judicial duties which his health permits and the business of his court demands. Retired judges do not receive new commissions. They continue to act under their original commissions. Retired District Judges, without any designation from the senior circuit judge, may continue to function in their own districts. *Maxwell* v. *The United States,* 3 Fed. [2nd] 906, where the Court said:

> "The short answer to all this is that Judge Smith, under his original commission, was entitled to hold the court of that district and required no designation from any one to do so. He was still a District Judge of that district, as the act itself clearly recognizes by directing, 'The judge so retiring voluntarily * * * shall be held and treated as if junior in commission to the remaining judges of said court.' Such is the construction which the act has universally received in practice in this circuit and so far as we know, in all the others."

This decision was affirmed *per curiam* in 271 U. S. 647, the point above mentioned having been covered by

the assignments of error and in both briefs. (See, also, *McDonough* v. *United States,* 1 Fed. [2nd] 147.)

Some words in Section 260 of the Judicial Code, relating to retirement, are not carefully chosen. It speaks of the appointment of a "successor" to a retired judge, and in the last paragraph, of "vacancies" caused by retirement. These words mean "successor" as regular active judge, and "vacancies" in the regular active list. We probably are overdoing the argument. Dissecting the phrases of the statute is but ringing the changes. The essential thing is that the Congress ordained that retired judges may continue to perform judicial functions, to do which, constitutionally, they must continue in office. In exchange for their continued labor they retain the constitutional protection against diminution of their compensation.

When the Act of February 25, 1919, was under discussion in the House of Representatives, Mr. Steele, in charge of the bill, said:

> "The merit of this provision is that instead of resigning the judge simply retires, and is still enabled to perform such judicial services as he is capable of performing when the business of the district demands it. The district thereby receives the benefit of such services without any additional expense to the Government."

The debate also discloses the following:

> "Mr. Rose: Under the wording of the present bill, I take it now, there will be no pensioning of the judges, as I understand the term. In other words, the judges are not retired from active service and pensionable when retired, but I understand they will always be considered as judges and be ready to perform duties when called upon, no matter what their ages may be?

Mr. Steele: That is true under the retirement feature. They are judges, and are supposed to be doing some judicial work. It is not true when they resign. There is still a retirement feature as to those who voluntarily resign." (Congressional Record, 65th Congress, 3rd Session, Vol. 57, Part 1, pp. 368-369.)

Later in the debate Mr. Graham, of the Judiciary Committee, said:

"* * * * The first part of this section makes no alteration in the existing law. The second part of the section introduces a new feature, and that is what has been denominated in these debates the retirement feature. * * * I recall an instance in our third circuit where the matter was under consideration. The presiding judge of the circuit stated that it was his desire, if he had the power, to call in Judge Gray, who had resigned, but that he could not because the resignation cut off his official function. Therefore it was that he suggested the framing of such a bill as this, * * *. It put as a reserve force those gentlemen who were able to discharge some of the duties of the office, but who wished to retire from the more active work after their service of 10 years, and passing the age of 70. They constituted a retired list which could be called upon, if they would be willing to serve, to help out in any emergency in the business and work of the court." (Congressional Record, 65th Congress, 3rd Session, Vol. 57, Part 1, p. 428.)

Under date of July 13, 1932, in a ruling (unpublished) addressed to the Attorney General for the guidance of disbursing officers, the Comptroller General considered the effect of Sections 106 and 107(a)(5) and (b) of the Act of June 30, 1932 (Public

Act No. 212). Section 106 provided that during the fiscal year ending June 30, 1933, "the retired pay of all judges (except judges whose compensation may not under the Constitution be diminished during their continuance in office) should be reduced", and Section 107(a)(5) also provided:

> "The salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum."

After quoting Section 260 of the Judicial Code containing the retirement provisions, and after referring to Section 1 of Article III of the Constitution, the Comptroller General said:

> "The judges who retire pursuant to section 375, title 28 U. S. Code, are nevertheless still in the service of the United States. (*Maxwell* v. *The United States,* 3 Fed. [2nd] 906, aff'd 271 U. S. 647.) Accordingly, the retired judges (numbers 13 to 23, inclusive, of your submission) must be held to have continued in office notwithstanding their retirement, and being judges of constitutional courts established pursuant to article III, section 1, of the Constitution of the United States, their salary may not be reduced so long as they continue on the retired list. Resigned judges occupy a different status and may not be said to have continued in office after resignation. Accordingly, they are not protected by the constitutional provisions from reduction of compensation irrespective of whether they were formerly judges of constitutional courts or legislative courts."

The Comptroller General said all there is to say on the subject.

By exercising their option to retire, these plaintiffs did not consent to a reduction in their compensation. At the time of their retirement there was no provision in the statute that on retirement their salaries could be reduced.

III.

A diminution after an increase of compensation, even though not a reduction below the rate at date of appointment, is a diminution within the letter and spirit of Section 1, Article III, of the Constitution.

This is a question affecting active as well as retired judges.

In both of the cases presented the rates of compensation fixed by law have been increased since the dates of appointment of the incumbents, and the reductions attempted by the Act of June 16, 1933, do not lower the compensation below the rates fixed by law at the dates of appointment. Nevertheless, it is a diminution of compensation during continuance in office within the meaning of the Constitution.

Such a reduction is fairly within the words of the Constitution. It is a diminution of their compensation occurring during their continuance in office. The Constitution does not say merely that the compensation shall not be diminished below the level fixed by law at the date of appointment. It forbids any diminution of the established and existing rate of compensation.

Such a diminution violates also the spirit and purpose of the Constitution.

In *Evans* v. *Gore,* 253 U. S. 245, 253, the Court said:

> "These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds."

The Court quoted in that case the following statement of Mr. Hamilton in the "Federalist" (No. 79):

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. * * * In the general course of human nature, a power over a man's subsistence amounts to a power over his will."

In *O'Donoghue* v. *The United States,* 53 Sup. Ct. Rep. 740, 743, it was said:

> "In framing the Constitution, therefore, the power to diminish the compensation of the Federal judges was explicitly denied in order *inter alia* that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master

of the purse, would otherwise hold the power to reduce their means of support."

If the legislative branch has power to take away an increase once granted, the judges, in the performance of their judicial functions are subject to the displeasure of that department which, as master of the purse, would hold the power to reduce their means of support. The difference between taking away an increase once granted and reducing the compensation below the point at which it stood on the date of a judge's appointment, is merely one of degree.

Hamilton's statement on this subject, in the Federalist, so often quoted, is as follows:

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power in any system which leaves the former dependent for pecuniary resource on the occasional grants of the latter. The enlightened friends to good government in every State have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these, indeed, have declared that *permanent* salaries should be established for the judges; but the experiment has, in some instances, shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced

to be requisite. The plan of the convention accordingly has provided, that the judges of the United States 'shall, at *stated times,* receive for their services a compensation, which shall not be *diminished* during their continuance in office.'

This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office in respect to him. It will be observed, that a difference has been made by the convention between the compensation of the President and of the judges. That of the former can neither be increased nor diminished. That of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an

> adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend which would be very sufficient at their first appointment would become too small in the progress of their service."

His reasoning leads to the conclusion that a diminution after an increase is contrary to the purpose of the constitutional provision, although he does use one phrase, "The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office in respect to him", suggesting he had in mind a diminution below the rate fixed at the date of appointment.

The celebrated protest by Chief Justice Taney (157 U. S. 701) is significant on this question. He was protesting against a diminution of the compensation of the justices through the operation of a statute imposing a 3% tax on their compensation. The Tax Act was enacted in 1862 (ch. 119, Sec. 86, 12 Stat. 472). Chief Justice Taney was commissioned on March 15, 1836. At that time the salary fixed by law for the Chief Justice was $5,000 per annum (Act of February 20, 1819, 3 Stat. 484). By the Act of March 3, 1855 (10 Stat. 643, 655) the salary of the Chief Justice was increased to $6,500 per annum, and it stood at that figure at the date of the passage of the taxing statute in 1862, no further change in the salary of the Chief Justice having been made until 1871 (Act of March 3, 1871, 16 Stat. 494). The 3% tax to which Chief Justice Taney objected did not operate to reduce

his compensation below the rate at which it stood when he was appointed. Four of the associate justices serving with him in 1863 (Justices Wayne, Catron, Nelson and Grier) had been appointed prior to March 3, 1855, when the salaries of associate justices were increased from $4,500 to $6,000 per annum. As to none of these did the tax statute objected to reduce their compensation below that in force at the date of appointment. The protest of Chief Justice Taney made no distinction between those whose salaries had been increased since appointment and those whose salaries had not varied. He made this significant statement:

> "I am, however, not willing to leave it to be inferred from my silence that I deem it the right of the legislature to diminish in this or any other mode the compensation of the judges *when once fixed by law.*" (Italics ours.)

In *James* v. *The United States,* 202 U. S. 401, the question almost reached the surface but the decision turned on the construction of the statute.

In *Evans* v. *Gore,* 253 U. S. 245, the Court considered the case of District Judge Gore, who was appointed in 1899. The question was whether his compensation was diminished by an income tax levied by the Act of February 24, 1919. His compensation at the time of appointment was $5,000 per annum, which had been raised to $6,000 in 1903, and to $7,500 on February 25, 1919. The question of diminution of his salary to a point above the level at the time of appointment was lurking in the record, though not argued or mentioned in the opinion, but the Court must have been aware of it, as it cited *City of New Orleans* v. *Lea, infra,* and *Commonwealth* v. *Mann, infra,* in which the point had been considered and decided.

In *Miles* v. *Graham*, 268 U. S. 501, the Court considered the case of Judge Graham of the Court of Claims, who had been appointed September 1, 1919. The case related to diminution of his compensation by a tax law passed February 24, 1919, prior to his appointment. The question we are now considering was not present.

In the cases of *O'Donoghue* v. *The United States*, and *Hitz* v. *The United States*, 53 U. S. Sup. Ct. Rep. 740, relating to judges of the Supreme Court and Court of Appeals of the District of Columbia, there had been no increase in the rate of compensation since their appointment.

We have examined all of the available works on constitutional law, pertinent articles in legal periodicals, the Lawyers Report Annotated, American Law Reports, Ruling Case Law, Corpus Juris, and the Decennial and Century Digests, and find no discussion or mention of this question of reduction after an increase, except in three state decisions, where the point was raised and decided in accordance with our contention.

In *Long* v. *Watts*, 183 N. C. 99, the Supreme Court of North Carolina considered the case of a judge of the Superior Court of North Carolina who sought relief against the imposition of an income tax upon his official salary. Section 18 of Article IV of the Constitution of North Carolina contained the following provision:

> "The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this article; but the salaries of the judges shall not be diminished during their continuance in office."

The point was raised that the judge's salary had been increased by law since his appointment, and that the tax did not diminish it below the original level. The Court said:

> "But it is urged that the Legislature of 1921 increased the plaintiff's salary, and, therefore, the same or any subsequent Legislature may levy a tax against it without incurring the charge of having diminished it during his continuance in office. This argument is based on the contention that by adding an additional sum, the Legislature may then tax the whole so long as the tax does not exceed the increase. Or, to state it differently, the theory of the argument is that because the Legislature thought it necessary and proper to increase the plaintiff's salary, therefore they have the right, notwithstanding the constitutional prohibition, to take it away. That the power to add carries with it the power to subtract, at least to the extent of the addition. This would entirely destroy the constitutional provision we are now considering, frustrate its purpose, and make it indeed a snare and a delusion. Any construction which tends to defeat or to nullify a fundamental principle of constitutional law, come from whatever source or quarter it may, is palpably unsound. *Commonwealth* v. *Mathues,* 210 Pa. St., 400. The Constitution is not to be so easily discarded. The moment the increase took effect it became as much a part of the plaintiff's salary as the original amount, and the whole was then protected by the constitutional prohibition against diminution. An undiminished salary is a complete salary in its entirety and not a salary less a tax."

In *City of New Orleans* v. *J. N. Lea,* 14 La. Ann.

Rep. 197, the Court considered the validity of a tax on the compensation of a Justice of the Supreme Court of that state. Article 75 of the Constitution of Louisiana, in force at that time (1859), provided:

> "The Judges both of the Supreme and inferior courts shall at stated times receive a salary which shall not be diminished during their continuance in office."

The Court said:

> "It may be, that the restriction in this Article upon the power of the Legislature refers *principally* to the diminution of the salaries of the Judges by a law fixing it at a less amount than that established at the epoch of their entrance into office.
>
> The object, however, of this Article was to secure the independence of the judiciary. If the Legislature can tax the salaries, it would be deprived of its plenary effect." (Italics ours.)

In *Commonwealth ex rel. Hepburn* v. *Mann,* 5 Watts and Sergeant 403, the Supreme Court of Pennsylvania applied a provision of the Constitution of that state, which read:

> "That the Judges of the Supreme Court and the President Judges of the several Courts of Common Pleas, shall at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office."

The relator, a President Judge of the Court of Common Pleas, was appointed March 5, 1839, at which time his compensation fixed by law was $1,600. By the Act of July 18, 1839, the rate of compensation was increased to $2,000 per annum, but by the Act of January 14, 1843, the latter Act was repealed. The Court,

in an exhaustive opinion, held that the Act of January 14, 1843, and also the Act of May 14, 1841 assessing a 2% tax on salaries of judges, were unconstitutional. In answering the contention that the Constitution of Pennsylvania did not prevent the Legislature from withdrawing an increase made after appointment, the Court said:

> "The sum of the argument is, that because the Legislature thought proper, by way of gratuity as it is called, to add to the salary of the relator, they have the right, notwithstanding the constitutional prohibition, to take it away. That the power that can create can likewise destroy. But this, it is obvious, is an unsound position, as it by no means follows that because, for reasons which will be hereafter stated, they thought it right and just to increase the compensation of the relator, they are at liberty to withdraw it under the pretext that as it was a gratuity, they were not constrained from resuming their bounty when they deemed it expedient. But to test the correctness of the argument, let us inquire what is the inevitable result of the position assumed by the respondent? If admitted in the extent claimed, and it is not susceptible of limitation, does it not lead to the entire frustration of the very object which the framers of the Constitution had in view, and which they have guarded with such sedulous care? If it be correct that the power over a man's subsistence amounts to a power over his will, what instrument better calculated to give the Legislature an undue and improper influence over the judicial department of the government, than by an address in the manner proposed to their hopes as well as their fears. As, for example, take the case in hand. Here the Legislature have assumed the control of the

relator, so far as he could be influenced by the possession or loss of $400 a year. Cases may occur when, with the aid of the additional salary, it may be merely a decent support of himself and family. A power therefore to reduce it may, it is obvious, be equivalent to a power to deprive him of office altogether. And the same observation is applicable to the class of Judges who are placed in a similar situation by the repeal of the Act of 19th July. Besides, this instrument of coercion or intimidation may be used as particular occasions may require, and to any extent, by the power which holds the purse-strings. The effect of it is impossible for any person to divine. It is not intentional disrespect to a co-ordinate branch, nor to the judiciary to suppose it possible that cases may arise, where, to effect a favourite object of legislative ambition, or to gratify the vindictive feelings occasioned by the frenzy and madness of party, a successful resort may be had, by such means, to the judicial tribunals of the country.

* * * * * *

It was, therefore, necessary to leave it to the discretion of the Legislature to vary its provisions in conformity to the variations in circumstances; yet under such circumstances as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation."

The purpose of the provision against diminution of compensation is to attract good men to the bench, to keep them from being forced to resign, and to avoid constraint upon their judicial acts. When Congress

raises the salaries of judicial officers, presumably it does so because of altered conditions and to provide fair compensation. As Hamilton said, "What might be extravagant to-day, might in half a century become penurious and inadequate." As the Supreme Court of Pennsylvania said, the original salary, plus the increase, "may be merely a decent support of himself and family". We find it hard to argue that power over the subsistence of Federal judges may influence their judicial acts. The unimpeachable integrity of the vast number of them refutes the suggestion that they might be swerved a hair's breadth by any thought of their personal situation. We prefer to urge that a power in the legislative branch to reduce compensation of Federal judges after a needed increase would influence good men to refrain from accepting judicial office, and would force resignations, opening the way to the appointment of judges of inferior quality or of less independence.

To diminish, after an increase, is, in the words of Hamilton, "to change the condition of the individual for the worse", and to place him "in a less eligible situation". It is to allow, what Chief Justice Taney protested against, a diminution of compensation of judges "when once fixed by law".

CONCLUSION

Both questions certified should be answered in the affirmative.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 656

WILBUR F. BOOTH

vs.

THE UNITED STATES.

No. 657

CHARLES F. AMIDON

vs.

THE UNITED STATES.

PLAINTIFFS' MEMORANDUM.

Extracts from Parliamentary Debates in the House of Lords, Thursday, July 27, 1933, and Thursday, November 23, 1933. (Official Reports, Vol. 88, No. 79; Vol. 90, No. 3.)

Upon the question propounded to the Lord Chancellor regarding the effect of the National Economy Act, 1931,

on the salaries of the Judges of His Majesty's Supreme Court of Judicature the following discussion occurred in the House of Lords in which the private memorandum of the Judges was submitted:

"JUDGES' SALARIES.

"LORD HANWORTH: My Lords, I beg to ask the Lord Chancellor the question on the Paper which stands in my name—namely, whether the attention of the Lord Chancellor has been drawn to the statements which have recently appeared in the Press with regard to the attitude of the Judges towards the reduction of their salaries under the National Economy Act, 1931, and whether he can make any statement on the subject. I should like to add to that that I have put this Question down and ask it with the authority and approval of the Lord Chief Justice of England, Lord Hewart, who joins with me in a desire to obtain the information.

"The LORD CHANCELLOR (VISCOUNT SANKEY): My Lords, I am obliged to the noble and learned Lord for putting down this Question and so giving me an opportunity of dealing with the matter. In view of the statements which have publicly appeared as to the position of the Judges in regard to the questions which arise by reason of the National Economy Act, 1931, I propose, with the approval of the Prime Minister and of the Judges, to make public a Memorandum which the Judges themselves prepared and place before the Prime Minister on December 4, 1931. That Memorandum states their collective attitude on the subject, an attitude from which they have never departed.

"The Memorandum, which is marked 'Private,' is in the following terms:

Royal Courts of Justice,
London, W. C. 2.

MEMORANDUM.

"'The Judges of His Majesty's Supreme Court of Judicature think it their duty to submit certain considerations in regard to the recent reductions of the salary payable to Judges which seem to have escaped notice.

"'It is we think beyond question that the Judges are not in the position occupied by civil servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the Constitution of this country. They stand equally between the Crown and the Executive, and between the Executive and the subject. They have to discharge the gravest and most responsible duties. It has for over two centuries been considered essential that their security and independence should be maintained inviolate.

"'The Act of Settlement made clear provision for this in the following terms: "That after the said limitation shall take effect as aforesaid, Judges' commissions be made *quamdiu se bene gesserint,* and their salaries ascertained and established: but upon the Address of both Houses of Parliament, it may be lawful to remove them." (12 and 13 Will. III, Cap. 2.) Further by Section 12 of the Act of 2 and 3 William IV, Cap. 116, Judges were exempted from taxes.

"'It was long ago said that there can be no true liberty in a country where the Judges are not entirely independent of the Government; and the soundness of the remark has never been questioned. Article III of the Constitution of the United States runs as follows:— "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

"'In this matter our country has set an example to the world, and we believe that the respect felt by the people for an English Judge has been partly due to his unique position, a feeling which will survive with difficulty if his salary can be reduced as if he were an ordinary salaried servant of the Crown.

"'It was owing to the general acceptance of these views that on the one hand the salaries of High Court Judges have never been the subject of a House of Commons Vote, but have been charged on the Consolidated Fund, and that on the other hand the Judges hold their office as expressed above during good behaviour and are removable only on an Address to the Crown by both Houses of Parliament.

"'If the salaries of the Judges can be reduced almost *sub silentio* by the methods recently employed, the independence of the Judicature is seriously impaired. It cannot be wise to expose Judges of the High Court to the suggestion, however malevolent and ill-founded, that if their decisions are favourable to the Crown in revenue and other cases, their salaries may be raised and if unfavourable may be diminished.

"'We must express our deep regret that no opportunity was given to the Judges of offering a voluntary reduction of salaries for an appropriate period; but we recognise that the Government was in a grave difficulty and that the time for consideration was very short.

"'We may add a single illustration of the peculiarity of the position of Judges in our Constitution. It is so to be found in the circumstance that if the point, already raised, were pressed that the National Economy Act, 1931, and the Order-in-Council dated the 1st October, 1931, did not have the legal effect of reducing the salaries of the Judges, because they are not "persons in his Majesty's Service," there is no tribunal in the land before whom such a question could be determined.

"'As to the amount of the reduction in the salaries of the Judges we prefer in this Memorandum to make no comment on our own behalf.

"'We should, however, desire to make one remark. When we consider the long line of exceptionally distinguished and able men who have occupied the position which we now hold, we cannot avoid expressing a fear that if the salary and the prestige of a High Court Judge are to remain as at present, those who will succeed us will probably not, as in the past, be drawn from the leaders of the Bar. There is now so little attraction to them to accept a seat upon the Bench, that it will be impossible to induce leading members of the Bar to make the necessary sacrifice.

"'The consequences in our opinion will be far-reaching and detrimental to the true interests of the country.'

"LORD HANWORTH: My Lords, I beg to thank the Lord Chancellor for the statement that he has been good enough to make.

"VISCOUNT CECIL OF CHELWOOD: My Lords, I am glad to know that the Government are considering what action, if any, they shall take, in order to deal with this very serious constitutional question. I do not wish to press the matter now, but I feel profoundly the weighty words in the Memorandum, and also the importance, to almost everything we value most in this country, of preserving intact the independence of the Judicial Bench. I hope that the Government will be able to announce shortly the step which they propose to take, in order to remove any possible doubt in this matter."

On November 23, 1933, the question again arose for discussion upon the following motion of Viscount Buckmaster:

"Moved to resolve, That this House is of opinion that there cannot be any true liberty unless the Judges of the Supreme Court are entirely independent of the executive Government; and to attain that result they should not only be irremovable except by an Address from both Houses of Parliament, but their salaries should not be diminished during their continuance in office.—(*Viscount Buckmaster.*)

The debate upon this question and motion led to an interesting historical discussion of the salaries of the English Judges and the differences between the powers of Parliament under the unwritten Constitution of Great Britain and the power of the Congress under the Constitution of the United States.

In the course of the debate, the Marquess of Reading said, among other things:

> "I would only make this last observation: that we should be careful not to be drawn into action which cannot be of use, because of something which happened in that emergency which we trust will not happen again. Nothing that you can do in this House, nothing that can be done constitutionally in this country, can prevent Judges' salaries coming up for consideration by Parliament. We are in a totally different position from the United States. If this matter were being discussed in the United States, certainly with regard to Judges of the Supreme Court, the position would be different, because theirs is a written Constitution, and there are words in Article 3 of Section 1 of that Constitution which make it plain—at any rate sufficiently plain—that a Judge's 'compensation' as it is termed, cannot be reduced, and therefore in order to effect any reduction it would be necessary to have an Amendment of the Constitution. But our position is quite different.
>
> * * * * * * *
>
> You cannot protect a Constitution in which Parliament is omnipotent unless you take away the omnipotence of Parliament. If, of course, my noble friend had a dictatorship in mind, it would surprise me, but nothing you can do by way of statute is actually going to affect that if you assume that some Government hereafter is going to propose to Parliament, and with a majority carry, any measure such as I have indicated. All I can say with regard to it is that while I agree absolutely with everything that has been said as to the in-

dependence, and of course the continued independence, of the Judges and the maintenance of their position as pillars of liberty in this country, I must point out to your Lordships that what was done was done with open eyes and with a clear mind, at any rate after explanations as full as possible had been given in the circumstances, and after the fullest consideration had been given to it."

The foregoing extracts are submitted for the convenience of the Court in support of plaintiffs' brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 656

WILBUR F. BOOTH

v.

THE UNITED STATES

No. 657

CHARLES F. AMIDON

v.

THE UNITED STATES

ON CERTIFICATES FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The Court of Claims rendered no opinions.

JURISDICTION

The certificates of the Court of Claims were filed December 14, 1933. The jurisdiction of this Court rests on Section 3 (a) of the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions certified in the two cases are identical and read as follows:

1. Does a United States district or circuit judge who, having served continuously for ten years and attained the age of seventy years, does not resign but retires under the provisions of Section 260 of the Judicial Code, as amended, continue in office within the meaning of Section 1 of Article III of the Constitution which forbids diminution of the compensation of judges during their continuance in office?

2. Where the salary of a United States district or circuit judge is increased by law after his appointment and he has subsequently retired in full compliance with the provisions of Section 260 of the Judicial Code, as amended; is a reduction of his compensation as a retired judge to an amount not below that fixed by law as his salary at the time of his appointment a diminution of his compensation within the meaning of Section 1 of Article III of the Constitution?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix (*infra*, pp. 27–29).

STATEMENT

The facts as disclosed by the certificates may be summarized as follows (No. 656, R. 1–3; No. 657, R. 1–3):

No. 656.—Wilbur F. Booth was appointed United States Circuit Judge for the Eighth Judicial Circuit on March 18, 1925, and qualified on March 27, 1925 (R. 1). For many years prior to and up to the time of such appointment he had held the office of Judge of the United States District Court for the District of Minnesota and by November 28, 1931, had served continuously as district or circuit judge for more than seventeen years (R. 1–2). On January 1, 1932, having attained the age of seventy, he retired pursuant to the provisions of Section 260 of the Judicial Code as amended by the Act of February 25, 1919 (R. 1, 2). Ever since his retirement he has continued to perform the duties of retired United States Circuit Judge in the manner provided by law and has participated in the hearing and decision of many cases pending in the Circuit Court of Appeals for the Eighth Circuit (R. 2).

At the time of the plaintiff's appointment as circuit judge the annual compensation of circuit judges was fixed by law at $8,500 per annum. It was increased to $12,500 per annum by the Act of December 13, 1926, c. 6, Section 1, 44 Stat. 919, and stood at that figure when he retired (R. 2). By Section 13 of the Independent Offices Appropriation Act of June 16, 1933 (Public No. 78), the retired pay of judges whose compensation prior to retirement or resignation could not under the Constitution have been diminished was reduced by 15%. Pursuant to that Act the plaintiff was paid

during the period from June 15, 1933, to October 31, 1933, at the rate of $10,625 per annum. The amount withheld from him during that time was $697.93 (R. 2). The plaintiff duly protested against this reduction and brought suit in the Court of Claims alleging that the Act of June 16, 1933, violates the constitutional provision that the compensation of Federal judges shall not be diminished during their continuance in office. The Government demurred to the petition.

No. 657.—Charles F. Amidon was appointed Judge of the United States District Court for the District of North Dakota on February 18, 1897, and qualified on February 27, 1897 (R. 1). From February 27, 1897, until June 2, 1928, he served continuously in that office (R. 1). On June 2, 1928, having attained the age of seventy years, he retired pursuant to Section 260 of the Judicial Code as amended by the Act of February 25, 1919 (R. 1). Ever since his retirement he has continued to perform the duties of a retired United States District Judge in the manner provided by law and has, as conditions have permitted and the business of the court demanded, performed judicial acts in that capacity (R. 2).

At the date of the plaintiff's appointment the salary of the United States District Judge was fixed by law at the rate of $5,000 per annum. It has been increased from time to time, and at the date of the plaintiff's retirement was at the rate of $10,000 per annum.

Pursuant to Section 13 of the Independent Offices Appropriation Act, *supra*, the plaintiff received during the period from June 15, 1933, to October 31, 1933, compensation at the rate of $8,500 per annum. He duly protested against the reduction and brought suit in the Court of Claims to recover the sum of $558.34, being the amount withheld during the period above mentioned (R. 2). The Government demurred to the petition.

SUMMARY OF ARGUMENT

I

The Constitution requires only that the compensation of a judge shall not be diminished during his "continuance in office." We submit that a judge who has availed himself of the retirement provisions of Section 260 of the Judicial Code as amended does not continue in office within the meaning of the Constitution. Although the statute authorizes a retired judge to perform judicial duties if called upon and willing to do so, he is under no duty to render any services whatever. The duty of performing judicial functions is an integral part of the office of judge, and the salary to which a judge is entitled, and which may not be diminished, is the salary which he receives in consideration of the performance of that duty. The Constitution specifies that judges shall receive compensation "for their Services," and it must have been contemplated that so long as a judge remained

"in office" he would render the services which it is the duty of a judge to render. We submit that the salary of a retired judge is not paid for services rendered, but is in the nature of a pension.

The retirement provisions of Section 260 of the Judicial Code indicate clearly the understanding and intent of Congress that a retired judge is not to be regarded as continuing in office. That section provides for the appointment of a "successor" to fill the vacancy caused by the retirement. These provisions are in striking contrast to those in the same Act authorizing the President to appoint an "additional" judge when a judge who is eligible for retirement and unable to discharge efficiently all the duties of his office "shall nevertheless remain in office, and not resign or retire." In such a case there is no vacancy until the death, resignation or retirement of the disabled judge, and the Act provides that when such vacancy occurs it shall not be filled. If a judge does not resign or retire, he "remains in office" in the language of the Act. If he resigns or retires, he no longer remains or continues in office. The office is filled by the successor, who assumes the duties formerly discharged by the retired judge.

It is for Congress to determine the fiscal policies of the Government, provided it violates no constitutional principles. The prohibitions contained in the Third Article were designed to protect the judiciary as a whole. But the attempted reduction

of the salaries of retired judges does not concern the judiciary as a whole. It must, moreover, be regarded as a legislative interpretation of the effect of the retirement act.

II

If the first question is answered in the negative, it will not be necessary to answer the second question. If, however, the first question is answered in the affirmative, then we think the second should be answered in the affirmative also. No Federal court has had occasion to decide whether a diminution which does not reduce the compensation below the amount fixed by law at the date of the judge's appointment is within the prohibition of Article III. Decisions of two state courts, however, support the plaintiff's contention in this regard, and we believe those decisions to be sound.

ARGUMENT

I

RETIRED JUDGES DO NOT CONTINUE IN OFFICE WITHIN THE MEANING OF THE THIRD ARTICLE OF THE CONSTITUTION

The constitutional prohibition against diminution of the compensation of Federal judges is limited in terms to the compensation which such judges are entitled to receive during their continuance in office. The first question certified by the court below presents the issue whether a judge who retires pursuant to Section 260 of the Judicial

Code, as amended (*infra*, p 27), continues "in office" within the meaning of that prohibition.

Prior to 1869 there was no provision for the payment of salaries or pensions to judges after resignation. In that year Congress, for the first time, provided that any Federal judge who had attained the age of seventy and had served for ten years or more might resign upon the salary payable to him at the time of resignation. Act of April 10, 1869, c. 22, sec. 5, 16 Stat. 44, 45. Under that Act a judge who was eligible for resignation could either remain in office, retaining all the powers and duties incident thereto, or relinquish such powers and duties and cease to be a judge.

In 1919 a new plan was devised, whereby a Federal judge, other than a Justice of this Court, who has attained the age of seventy and has served for ten years or more, may "retire, upon the salary of which he is then in receipt" from regular active service on the bench. (Section 260 of the Judicial Code, as amended by the Act of February 25, 1919, *infra*, p. 27.) A judge so retiring is under no obligation to perform any judicial duties whatever. He may, however, be called upon and "authorized" to perform such judicial duties as he may be willing to undertake. Whether or not he renders any service, yet he receives his former salary, not as compensation for services rendered, but as a pension for past services, just as though he had resigned. It is with the status of such retired judges in re-

spect of the constitutional guaranty against reduction of salary that these cases are concerned.

The words of the Constitution are, as this Court has frequently held, to be taken in their ordinary, natural sense. *The Pocket Veto Case,* 279 U.S. 655, 679; *United States* v. *Sprague,* 282 U.S. 716, 731. The word "office" has been defined in a number of cases, of which we shall mention only a few. In *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514, this Court, adopting the definition given in *United States* v. *Hartwell,* 6 Wall. 385, said (p. 520):

> An office is a public station conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties fixed by law.

Chief Justice Marshall said, in *United States* v. *Maurice,* 26 Fed. Cas. No. 15747:

> An office is defined to be "a public charge or employment," and he who performs the duties of the office, is an officer.

The same thought was expressed in a somewhat amplified form in *Clark* v. *Stanley,* 66 N.C. 59, 63:

> A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This, we consider to be the true definition of a public officer in its original broad sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the State.

The following quotation appearing in *Bradford* v. *Justices of Inferior Court,* 33 Ga. 332, 336, adverts to the etymology of the word:

> * * * "It is said that the word *officium* principally implies a duty, and in the next place the charge of such duty; and that it is a rule, that where one man hath to do with another's affairs against his will and without his leave, that it is an office, and he who is in it is an officer." Carth. 478, 4 Jacob's Law Dic. 433. * * *

In *Throop* v. *Langdon,* 40 Mich. 673, 682, the court, speaking through Judge Cooley, said:

> An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer.

See also: *Reed* v. *Schon,* 2 Cal. App. 55; *State* v. *Griswold,* 73 Conn. 95, 97; *United States* v. *Trice,* 30 Fed. 490, 494 (W.D. Tenn.); *State Prison of North Carolina* v. *Day,* 124 N.C. 362, 368.

These quotations make it clear that the term "office" implies an obligation to render services—to perform the duties incident to the position. Indeed, it is difficult to conceive of an office to which no duties are attached. As was said in *Commonwealth* v. *Gamble,* 62 Pa. St. 343, 349:

> It seems like a solecism to regard that to be an office in this country, to which there

> are no duties assigned. "An office", says Kent, vol. 3, p. 454, "consists in a right and correspondent duty to execute a public or private trust, and to take the emoluments." To the same effect are Cruise's Dig. vol. 3, p. 117, and Bouv. Law Dict. *Verbum* "Office."
>
> * * * It seems to me that it could not be maintained for a moment, therefore, that a president judgeship, created without any duties to be performed, or authority to be exercised, would not be an office in the sense of the Constitution, or at common law, as applicable to this country; if so, by parity of reason, it would cease to be such if its duties and authorities are all taken away. * * *

Consequently, we submit, it is only reasonable to suppose that the framers of the Constitution contemplated that the office to which reference is made in the Third Article would comprise duties as well as powers and privileges.

While the Constitution defines the powers of the Federal judiciary, it does not prescribe in detail the duties. Those duties are, in the main, to be found in the nature of the office as it grew up under the common law. Some of the duties, however, are defined by statute. Thus, district judges are required to hold court regularly at stated places in their respective districts. (Judicial Code, Secs. 70–115, as amended; U.S.C., Title 28, Secs. 142–196.) And it is "the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time

according to law." (Judicial Code, Sec. 118, as amended; U.S.C., Title 28, Sec. 213.) These duties, we submit, although defined by statute as to the time and place of performance, are an integral part of the constitutional office of judge. For refusal to hold court as required by law a judge may be impeached.[1] Yet a retired judge is, by the terms of the statutes under which he retires, relieved of all obligations to render service and need never act in a judicial capacity unless he feels disposed to do so.

The word "office" appears in both the tenure of office provision and the provision relating to compensation. It must be presumed to have the same meaning in both places. "Tenure of office during good behavior imports not only the length of the term but also the extent of service." *Opinion of the Justices,* 271 Mass. 575, 580. Congress, therefore, may not compel a judge to retire to part-time service against his will, because to do so would be to deprive him of one of the essential elements of office. It would seem to follow that if a judge voluntarily retires from regular, active service, he does not continue in office within the meaning of the Constitution.

It is argued that unless a retired judge remains "in office" he is necessarily without power to ex-

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[1] See impeachment of District Judge Humphreys, Cong. Globe, 37th Cong., 2d Sess. pp. 2942–2953, and particularly Article 5 of the Articles of Impeachment, appearing at p. 2950.

ercise judicial authority, and that conversely, if he has the right to perform judicial duties, as Congress intended he should, it must follow that he remains in office within the meaning of the Third Article. Since the word "office" is obviously used by counsel for the plaintiffs with respect to the compensation provision, the argument comes down to this—that the right to receive undiminishable compensation is necessarily and under all circumstances coextensive with the privilege to perform judicial duties. Stated another way, the contention is that a judge cannot relinquish the right to a protected salary and at the same time have the right, if called upon, to perform judicial duties. We submit that nothing in the Constitution compels this conclusion.

The purpose of the tenure of office and compensation provisions was to prevent the involuntary removal of a judge during good behavior or the diminution of his salary while he continues in office. It is doubtful whether the framers of the Constitution envisaged the somewhat anomalous situation of a judge being in office in the sense that he retains the power to act in a judicial capacity and at the same time being relieved of the duties and obligations incident to the office of judge. Nevertheless, while Congress may not deprive a judge of the judicial powers and privileges against his will, there is no constitutional prohibition upon its permitting him to retire from active service of his own volition. The only question is

whether, having availed himself of the privilege extended to him, a judge may still claim the benefits and immunities conferred by Article III.

The language of the Constitution should be interpreted "in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used." *Popovici* v. *Agler,* 280 U.S. 379, 383. While the framers of that instrument were vitally interested in safeguarding the salaries of Federal judges, they undoubtedly assumed that so long as a judge remained "in office" he would perform all the duties attached to the position, and that when he found himself no longer able to perform those duties efficiently he would resign and cease to be a judge. The Third Article provides that judges shall receive "for their Services" a compensation which shall be paid at stated intervals and shall not be diminished. It cannot have been intended that this compensation was to be paid for services to be rendered at will. By accepting the office a judge obligates himself to discharge all the duties of the office. The word "Services" must mean the services commonly rendered by a judge—those which it is his duty to render. Thus, although the amount of compensation or salary does not depend upon the *quantum* of service, which may vary from time to time and from place to place, it was beyond reasonable doubt intended as consideration for performance of those duties which a judge is under obligation to perform. Cf. *Benedict* v. *United States,* 176 U.S. 357, 360.

We think it self-evident that Section 1 of the Third Article, providing that judges shall receive at stated times compensation for their services, has no application to a judge who has retired from office and whose successor has been appointed and is now the incumbent of the office, receiving its emoluments in consideration of the performance of the duties of the office. The retired judge is not paid for services rendered, for he is relieved by the retirement statute from the obligation to perform all or any of the duties which he was required to perform when he held the office. He receives his former salary irrespective of the rendition of any service. If called upon to perform judicial duties he has the right to decline to act, and his pay in no sense whatever can be termed compensation for services, because he may perform no services and by statute is expressly relieved from the performance of the regular active duties of the office. These regular active duties embrace all the duties of the office. A judge has no inactive, irregular duties. Upon assuming office he is required to take the following oath (Judicial Code, Sec. 257; U.S.C., Title 28, Sec. 372):

> I, ---------- ----------, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ---------- according to the best of my

abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God.

The successor to the retired judge takes the same oath and is required to perform all the duties of the office to which he succeeds. The inherent unsoundness of the position of the plaintiffs is shown by the following statement on p. 12 of their brief: "Even an active judge is under no more than a moral obligation to perform all of the judicial duties which his health permits and the business of his court demands." It is, we submit, palpably unsound to say that the duty devolving upon a judge, who has accepted office and taken an oath faithfully to discharge and perform all the duties incumbent upon him as judge according to the best of his abilities, is the same or in any way analogous to the obligation of a retired judge who has been relieved of the performance of the duties which he was required to perform prior to his retirement. The one is under the obligation imposed by the Constitution and the statutes, supplemented by his oath of office, to perform all the duties of a judge, while the other in retiring is expressly relieved of the obligation to perform the duties which appertained to the office from which he retired.

Since a retired judge is under no obligation other than that imposed by conscience, his salary cannot be regarded as compensation in the usual sense. We submit, despite the statements quoted by the plaintiffs from the debates in Congress (Brief, pp.

13–14), that in reality retired pay is more analogous to a pension than to the compensation of a judge in regular active service. Such retired pay is not given by way of consideration for the discharge of duties *in praesenti,* but rather in recognition of services rendered in the past. Consequently, we submit it is not the kind of compensation which the Third Article was designed to protect.

The Act of February 25, 1919, amending Section 260 of the Judicial Code, discloses on its face the understanding and intent of Congress that a judge who avails himself of the privilege of retiring does not continue in the office which he previously held. Upon retirement he is relieved of all the obligations of the office and has no further duties to perform except such as he may be willing to undertake. The provision that the President shall appoint a "successor" shows that the retirement creates a vacancy which must be filled. Since the new judge is a successor to the old one, there was no need to make provision for or against the appointment of another judge upon the death or resignation of the one who has retired for there is then no vacancy to be filled, the vacancy having occurred when the retirement took place. These provisions are in striking contrast to those authorizing the appointment of an additional judge when a judge who is eligible for retirement and unable to discharge efficiently all the duties of his

office "shall nevertheless remain in office and not resign or retire." In such a case the new judge is in no sense a "successor." He cannot succeed to an office which is still occupied. A vacancy does not occur until the death, resignation, or retirement of the disabled judge, but the Act recognizes that there is a vacancy at that time and expressly provides that when such vacancy occurs it shall not be filled. Thus, in the one instance the original office is filled by a new judge, whereas in the other a distinctly new office is created and an additional judge appointed who fills the new office.

The statement in plaintiff's brief (p. 10) that it "is a self-evident proposition" that the retired judges continue in office, is, we submit, in conflict with the very terms of the retirement statute. The statute provides that the "vacancy" caused by the death, resignation or *retirement* of a judge, shall not be filled when the President has appointed an additional judge, upon a finding that the judge was disabled.

So Congress has said that the retirement of a judge creates a vacancy. This means that the retired judge has vacated the office. Not only did Congress so declare, but it provided that when a judge retired his "successor" should be appointed to the vacancy thereby created. There could, of course, be no successor to a person holding an office, until that person had vacated the office.

The statute further provides that if a judge is disabled, but "shall nevertheless remain in office

and not resign or retire," the President in that event cannot appoint a successor to the disabled judge because he remains in office and will not retire, but he is authorized to appoint "an additional" judge, and if later the disabled judge retires and thereby creates a vacancy, Congress prohibits the President from filling the vacancy, as the additional judge already appointed is sufficient.

The word "successor" is a word of fixed meaning. "According to all the lexicographers, a successor is merely one who succeeds or takes the place of another." *State* v. *Andrews,* 64 Kan. 474, 496; 60 Corpus Juris 985. A successor is a "person who has been elected or appointed to some office after another person." Bouvier's Law Dictionary (Rawle's 3d rev.), Vol. 3, p. 3176. A successor is "one who has been appointed or elected to hold an office after the term of the present incumbent." Black's Law Dictionary (2d ed.), p. 1119.

We submit that it is evident that the judge who retires does not continue in the office from which he retires for the following reasons: First, a successor is appointed who succeeds to the office the retired judge held—and it will not be contended that there may be two incumbents of one office. Second, prior to retirement, the judge was bound to perform all the duties of the judgeship—bound by fixed principles and by his oath of office wherein he swore faithfully to discharge and perform all the duties incumbent upon him. After his retirement, he is relieved of the obligation to perform these

duties, and upon the appointment and qualification of his successor, the performance of all the duties of the office devolves upon him. Third, by the terms of the statute his retirement creates a vacancy, and it is impossible for one to continue in office after he has vacated the office. Fourth, the judge who succeeds the retired judge is nominated by the President as the "successor" of the retired judge, and he in fact takes the place and office formerly held by the retired judge. His appointment and commission in no way limit his powers or duties. His duties, power, and authority are just the same as those of every other active District or Circuit Court of Appeals judge, as the case may be. These are in no respect different from what they would be had the retired judge resigned instead of retiring.

In the case of *People* v. *Duane*, 121 N.Y. 367, 373, the court, discussing the question of the status of a retired Army officer, said:

> The statute evidently contemplated the vacation of the office by retiring army officers, and in terms produces such vacancy as completely as in cases of death or resignation. It provides that "the vacancies consequent upon such retirement" shall be filled by promoting to the place of the officer retired the next in rank, according to the established rules of the service. There was, of course, no vacancy to fill and no one could be promoted to the defendant's place, as an officer, so long as he himself held the office.

When Judge Booth retired, the President nominated John B. Sanborn "to succeed Wilbur F. Booth, retired," and Judge Sanborn was commissioned on January 23, 1932. No one was appointed to succeed Judge Amidon for the reason that on June 25, 1921, Congress had passed an Act (Act of June 25, 1921, c. 29, 42 Stat. 66) authorizing and instructing the President to appoint an "additional judge" for the District of North Dakota, such additional judge to be "held and treated as the senior judge" and to "exercise such powers and perform such duties in that judicial district as may be incident to seniority." See H.Rep. No. 130, 67th Cong., 1st Sess.[2] Pursuant to that Act, Judge Miller was appointed as an additional judge for the District of North Dakota on February 2, 1922. Section 2 of the Act provided:

> That whenever a vacancy shall occur in the office of the district judge for the district of North Dakota, by the retirement, disqualification, or death of the judge senior in commission, such vacancy shall not be filled, and thereafter there shall be but one district judge in said district.

Accordingly, when Judge Amidon retired, the "vacancy" caused by his retirement was not filled, and in the words of the statute there is now "but one

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[2] Judge Amidon did not reach the age of seventy until August 1926, and was therefore unable to take advantage of Section 260 of the Judicial Code prior to that date.

district judge in said district" of North Dakota and that District Judge is Judge Miller.

The effect of the retirement provisions has been considered in only two cases, neither of which, we submit, has any direct bearing upon the question here involved. In *Maxwell* v. *United States,* 3 F. (2d) 906 (C.C.A. 4th), a suit brought by the Government for breach of contract, the argument was made that the district judge who had retired from regular, active service had not been properly requested and authorized to act. The Circuit Court of Appeals held that a retired district judge may hold court in his own district without specific request or authorization by anyone. This Court affirmed the decision *per curiam,* citing only authorities dealing with the contract question involved. 271 U.S. 647.

In *McDonough* v. *United States,* 1 F. (2d) 147 (C.C.A. 9th), the defendant was convicted of a violation of the National Prohibition Act. The Circuit Court of Appeals affirmed the decision of the trial court and thereafter the defendant moved for a rehearing and later filed a supplemental petition for rehearing on the ground that one of the judges of the Circuit Court of Appeals had retired and had not been duly requested and authorized to participate in the case. This question had not been raised in the trial court or at the original hearing before the Circuit Court of Appeals. The

court stated that the defendant conceded that the retired judge had not relinquished his power to perform the duties of circuit judge when called upon to do so, and held that the contention that he had not been properly called upon was without merit. The petitioner then filed a petition for certiorari, contending for the first time that a retired judge is without authority to act in a judicial capacity under any circumstances. The petition was denied. 266 U.S. 613.

It seems hardly necessary to state that as lawyers and officers of this Court we are perhaps as much concerned with maintaining the independence of the judiciary as are the plaintiffs themselves. On the other hand, it is the declared policy of Congress in the present emergency to reduce the expenses of government. Since it is for Congress to determine the means to this end, provided only it does not transcend the authority conferred upon it by the Constitution, we conceive it to be our duty to advance the arguments which tend to show that the challenged statute is valid. Section 13 of the Act of June 16, 1933 (*infra*, p. 29), is clear and unambiguous. It was unquestionably designed to reduce the salaries of the plaintiffs and all other Federal judges who have retired from regular, active service. It must be regarded as reflecting the considered opinion of Congress as to the effect of retirement and of the provisions of Section 260 of

the Judicial Code which authorize retirement, for it is not to be presumed that Congress was ignorant of the fact that so long as a judge remains in office his compensation may not be reduced.

The limitations upon the power of Congress appearing in Section 1 of Article III were designed to protect the judiciary as a whole rather than to benefit any individual member or members thereof. *Evans* v. *Gore,* 253 U.S. 245, 253. But the validity of the statute under attack does not affect the judiciary as a whole in the slightest degree, either directly or indirectly, unless it may be said that men would be deterred from accepting judgeships in the absence of a guaranty of the privilege of retiring at full salary. Perhaps the inducement to accept positions on the Federal bench would have been greater had the framers of the Constitution seen fit to assure judges that their compensation would continue after resignation or retirement from active service. The fact remains, however, that this was not done and the omission has not led to serious difficulties in securing the services of men of character and ability. As we have pointed out, for more than eighty years after the ratification of the Constitution, there was no provision for the payment of pensions to resigned judges, and even at the present time the privilege of retirement is not open to Justices of this Court.

II

A DIMINUTION AFTER AN INCREASE IN COMPENSATION, EVEN THOUGH THE COMPENSATION IS NOT REDUCED BELOW THE AMOUNT FIXED BY LAW AT THE DATE OF THE JUDGE'S APPOINTMENT, WOULD SEEM TO BE CONTRARY TO THE INTENT OF THE THIRD ARTICLE OF THE CONSTITUTION

The second question certified by the court below is whether the Third Article prohibits the diminution of the compensation of judges, even though such diminution does not reduce the compensation below the amount fixed by law at the date of the judge's appointment. If the first question is answered in the negative, it will not be necessary for the court to answer the second question. If, however, the answer to the first question is in the affirmative, we think the second question should also be answered in the affirmative.

Although this question has never been directly passed upon by this or any other Federal court, it has been latent in two cases which this Court has decided. In *James* v. *United States,* 202 U.S. 401, the point was discussed in the petitioner's brief but was not contested by the Government. The decision turned wholly on the construction of the statute there involved. See also *Evans* v. *Gore,* 253 U.S. 245, *supra.* Well-reasoned opinions of the highest courts of two of the States take the view that the compensation fixed by the legislature

from time to time becomes the compensation which the judges are constitutionally entitled to receive and which may not be diminished during their continuance in office. *Long* v. *Watts,* 183 N.C. 99; *Commonwealth ex rel. Hepburn* v. *Mann,* 5 W. & S. (Pa.) 403. See also *City of New Orleans* v. *Lea,* 14 La. Ann. 197. We think this view is sound and that if a retired judge continues in office so that his compensation cannot be diminished, he is entitled to be paid the salary which he received at the time of his retirement.

CONCLUSION

The first question certified should be answered in the negative. If, however, it is answered in the affirmative, then we think the second question should be answered in the affirmative also.

Respectfully submitted.

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JANUARY 1934.

APPENDIX

Section 260 of the Judicial Code as amended by Section 6 of the Act of February 25, 1919, c. 29, 40 Stat. 1156, 1157, and by the Act of March 1, 1929, c. 419, 45 Stat. 1422 (U.S.C.Sup. VI, Title 28, Sec. 375), provides:

> SEC. 260. When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years continuously or otherwise, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to under-

take or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake.

In the event any circuit judge, or district judge, having so held a commission or commissions at least ten years, continuously or otherwise, and having attained the age of seventy years as aforesaid, shall nevertheless remain in office, and not resign or retire as aforesaid, the President, if he finds any such judge is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character, may, when necessary for the efficient dispatch of business, appoint, by and with the advice and consent of the Senate, an additional circuit judge of the circuit or district judge of the district to which such disabled judge belongs. And the judge so retiring voluntarily, or whose mental or physical condition caused the President to appoint an additional judge, shall be held and treated as if junior in commission to the remaining judges of said court, who shall, in the order of the seniority of their respective commissions, exercise such powers and perform such duties as by law may be incident to seniority. In districts where there may be more than one district judge, if the judges or a majority of them cannot agree upon the appointment of officials of the court, to be appointed by such judges, then the senior judge shall have the power to make such appointments.

Upon the death, resignation, or retirement of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as provided in this section,

the vacancy caused by such death, resignation, or retirement of the said judge so entitled to resign shall not be filled.

Section 13 of the Independent Offices Appropriation Act of June 16, 1933, c. 101, 48 Stat. 283, 307, provides:

> SEC. 13. For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum.

Section 1 of Article III of the Constitution provides:

> SECTION 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

Nos. 656 and 657.—OCTOBER TERM, 1933.

656	Wilbur F. Booth, *vs.* The United States.	On Certificates from the Court of Claims.
657	Charles F. Amidon, *vs.* The United States.	

[February 5, 1934.]

Mr. Justice ROBERTS delivered the opinion of the Court.

The Court of Claims has certified two questions:

"1. Does a United States District or Circuit Judge who, having served continuously for ten years and attained the age of seventy years, does not resign but retires under the provisions of section 260 of the Judicial Code, as amended, continue in office within the meaning of section 1 of article III of the Constitution which forbids diminution of the compensation of Judges during their continuance in office?

"2. Where the salary of a United States District or Circuit Judge is increased by law after his appointment and he has subsequently retired in full compliance with the provisions of section 260 of the Judicial Code, as amended; is a reduction of his compensation as a retired Judge to an amount not below that fixed by law as his salary at the time of his appointment a diminution of his compensation within the meaning of section 1 of article III of the Constitution?"

We are informed by the certificate in No. 656 that Wilbur F. Booth was appointed United States Circuit Judge for the Eighth Judicial Circuit on March 18, 1925, and qualified March 27, 1925. For many years prior to and up to the time of this appointment he had held the office of judge of the United States District Court for the District of Minnesota, and on November 28, 1931, he had served continuously as District or Circuit Judge for more than seventeen years. January 1, 1932, having attained the age of seventy, he retired, pursuant to the provisions of Section 260 of

the Judicial Code as amended. Since his retirement he has continued to perform the duties of a retired United States Circuit Judge in the manner provided by law, and has participated in the hearing and decision of many cases pending in the Circuit Court of Appeals for the Eighth Circuit.

At the time of Judge Booth's appointment as Circuit Judge the annual compensation was fixed by law at $8,500 per annum, and was subsequently increased to $12,500 per annum, at which figure it stood when he retired. By Section 13 of the Independent Offices Appropriation Act of June 6, 1933 (Public No. 78) it was provided:

"For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum."

By reason of this Act the plaintiff was paid during the period from June 15, 1933, to October 1, 1933, at the rate of $10,625 per annum. The amount withheld from him during that period was $697.93. He duly protested against the reduction, and brought suit in the Court of Claims, asserting that the Act violates the provision of the Constitution which forbids diminution of the compensation of federal judges during their continuance in office. The Government demurred to the petition.

The relevant facts certified in No. 657 are that Charles F. Amidon was appointed Judge of the United States District Court for the District of North Dakota on February 18, 1897, and qualified on February 27, 1897. From the date last mentioned to June 2, 1928, he served continuously in that capacity. Having attained the age of seventy years he retired June 2, 1928, pursuant to Section 260 of the Judicial Code as amended, and has ever since continued to perform the duties of a retired United States District Judge in the manner required by law; and has, as conditions permitted and the business of the court demanded, performed judicial acts as such retired judge.

At the date of his appointment the salary of the office was fixed by law at the rate of $5,000 per annum. It has been increased from time to time and at the date of plaintiff's retirement was

at the rate of $10,000 per annum. Pursuant to Section 13 of the Independent Offices Appropriation Act, *supra*, he received, during the period from June 15, 1933, to October 31, 1933, compensation at the rate of $8,500 per annum. He protested against the reduction and brought suit in the Court of Claims to recover the sum of $558.34, the amount withheld during the period mentioned. The Government demurred to the petition.

The pertinent portion of Section 1 of Article III of the Constitution is:

"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

1. The first question asks, in effect, whether a United States Judge, upon retirement, relinquishes or retains his office. The answer is to be found in the Act of Congress authorizing retirement.[1] That Act provides for resignation and for retirement. In referring to the former it uses the expression "When any judge . . . resigns his office" . . ., and provides for con-

[1] Judicial Code, § 260, as amended by the Act of February 25, 1919, Ch. 29, Sec. 6, 40 Stat. 1157, U. S. C. Title 28, § 375; and the Act of March 1, 1929, Ch. 419, 45 Stat. 1422:

"When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years, continuously [or otherwise], and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake.

"In the event any circuit judge, or district judge, having so held a commission or commissions at least ten years, continuously [or otherwise], and

tinuance of compensation after resignation. In contrast it declares, "But, instead of resigning, any judge . . . who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, ..." not, be it noted, from office. The retiring judge may be called upon by the senior circuit judge to perform judicial duties in his own circuit or by the Chief Justice to perform them in another circuit, and be authorized to perform such as he may be willing to undertake. There is provision for appointment by the President of an additional judge for the circuit or district court where a sitting judge is found unable efficiently to discharge all his duties by reason of mental or physical infirmity of a permanent character. In that case the sitting judge unquestionably retains his office; and it is significant that the act declares either a retired judge, or one whose mental or physical condition has caused the President to appoint an additional judge, shall be treated as junior to the remaining judges of the court.

By retiring pursuant to the statute a judge does not relinquish his office. The language is that he may retire from regular active service. The purpose is, however, that he shall continue, so far as his age and his health permit, to perform judicial service, and

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having attained the age of seventy years as aforesaid, shall nevertheless remain in office, and not resign or retire as aforesaid, the President, if he finds any such judge is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character, may, when necessary for the efficient dispatch of business, appoint, by and with the advice and consent of the Senate, an additional circuit judge of the circuit or district judge of the district to which such disabled judge belongs. And the judge so retiring voluntarily, or whose mental or physical condition caused the President to appoint an additional judge, shall be held and treated as if junior in commission to the remaining judges of said court, who shall, in the order of the seniority of their respective commissions, exercise such powers and perform such duties as by law may be incident to seniority. In districts where there may be more than one district judge, if the judges or a majority of them can not agree upon the appointment of officials of the court, to be appointed by such judges, then the senior judge shall have the power to make such appointments.

"Upon the death, resignation, or retirement of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as provided in this section, the vacancy caused by such death, resignation, or retirement of the said judge so entitled to resign shall not be filled." The words enclosed in brackets were added by the Act of March 1, 1929.

it is common knowledge that retired judges have, in fact, discharged a large measure of the duties which would be incumbent on them, if still in regular active service. It is scarcely necessary to say that a retired judge's judicial acts would be illegal unless he who performed them held the office of judge. It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge. The Act does not and, indeed, could not, endue him with a new office, different from, but embracing the duties of the office of judge. He does not surrender his commission, but continues to act under it. He loses his seniority in office, but that fact, in itself, attests that he remains in office. A retired District Judge need not be assigned to sit in his own district. *Maxwell* v. *United States*, 3 F. (2d) 906; affirmed 271 U. S. 647. And if a retired judge is called upon by the Chief Justice or a Senior Circuit Judge to sit in another district or circuit, and he responds and serves there, his status is the same as that of any active judge, so called. *McDonough* v. *United States*, 1 F. (2d) 147. It is impossible that this should be true, and that at the same time the judge should hold no office under the United States.

The Government argues that the holding of an office involves the performance of duties, and since no duties are obligatory on one who has retired under the Act, he cannot be said to hold any office. But Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it. This was the evident purpose; and the statements made by the member in charge of the bill on the floor of the House show that it was expected, as has proved to be the case, that retired judges would render valuable judicial service. Cong. Rec. 65th Cong. 3rd Sess. Vol. 57, Part 1, pp. 368-369. It is too late to contend that services so performed were extra-legal and unconstitutional.

Some reference is made to the fact that under the Act a successor to the retiring judge is to be appointed, and it is claimed the direction is inconsistent with his retention of office. The phraseology may not be well chosen, but it cannot be construed to vacate the office of the retiring judge, in the light of the evident purpose that he shall continue to hold office and perform official duties.

2. Does the Constitution prohibit reduction of the compensation which was fixed by law at the time of appointment or that to which the judge was entitled at the date of retirement?

In other words, is a diminution after an increase banned, if the compensation notwithstanding the reduction remains in excess of that payable when the incumbent took office? The answer must be in the affirmative. Several courts, in well-considered decisions, have so interpreted analogous provisions of State constitutions (*Commonwealth ex rel. Hepburn* v. *Mann*, 5 Watts & S. (Pa.) 403; *City of New Orleans* v. *Lea*, 14 La. Ann. 197; *Long* v. *Watts*, 183 N. C. 99) and the Solicitor General with commendable candor admits that a contrary construction would be subversive of the purpose of Section 1 of Article III.

Question 1 Answered Yes.
Question 2 Answered Yes.

A true copy.

Test:

Clerk, Supreme Court, U. S.